

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK**

**ROY RICE,
SSN: XXX-XX-6595**

Plaintiff,

**DECISION AND ORDER
CIVIL ACTION NO.: 04-CV-6426**

vs.

**JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY**

Defendant.

Now before the Court is plaintiff's motion for an award of attorney's fees pursuant to 42 U.S.C. §406(b)(1) and requesting an order directing the defendant to issue a Notice of Award indicating the total past due benefits due the plaintiff and the amount withheld for payment of attorney's fees (Dkt. No.: 17). The plaintiff's attorney seeks fees in the amount of 25% of the past due benefits on the basis of a contingency fee agreement between the plaintiff and his attorney. For the reasons that follow, the Court grants plaintiff's motion for attorney's fees and an order directing the defendant to issue a Notice of Award showing the total amount of past due benefits paid to the plaintiff and the amount withheld for the payment of attorney's fees.

The Court has considered the plaintiff's notice of motion, the affidavit from plaintiff's counsel, the accompanying memorandum of law in support of the motion and the affidavit of the plaintiff in support of the motion for payment of attorney's fees of 25% of the past due benefits.

The Commissioner has filed a reply/response to the motion for attorney's fees indicating that she has no objection to the motion for attorney's fees (Dkt. No.: 18).

Mark M. McDonald, Esq., plaintiff's attorney, began providing services to plaintiff on 07-29-04. Since that time, McDonald has spent a total of 47.75 hours representing the plaintiff at the Federal Court level. McDonald has been compensated \$6,783.58 for the Federal Court work pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. §2412(d) plus \$150.00 costs (Dkt. No.: 16).

McDonald now moves for an award equal to 25% of plaintiff's past due benefit. In addition, McDonald seeks an order requiring the defendant to provide a Notice of Award indicating the amount of the plaintiff's total past due benefit and the amount withheld for attorney's fees. In addition, McDonald, seeks an order that requires the lesser of the two amounts awarded for attorney's fees be refunded to the plaintiff.

The Court having considered the application's reasonableness pursuant to Grisbrecht v. Barnhart, 535 U.S. 789, 808, 122 S.Ct. 1817, 152 L.Ed. 2d 996 (2002), the Court concludes that the requested attorney's fees are reasonable and should, therefore, be awarded. The Court also concludes that the plaintiff is entitled to a Notice of Award indicating the total amount of past due benefits, as well as, the amount withheld for the payment of attorney's fees. And, it is hereby;

ORDERED that the plaintiff's motion for attorney's fees in the amount of 25% of the past due benefits pursuant to 42 U.S.C. §406(b)(1) is granted. The award is to be made payable to Mark M. McDonald, Esq., attorney for plaintiff. Upon receipt of this award McDonald is ordered to refund to the plaintiff, Roy Rice, the lesser amount of the two attorney's fees awarded.

IT IS FURTHER ORDERED that the defendant provide to the plaintiff and his counsel within ninety (90) days of filing and entering this order, a Notice of Award indicating the total amount of past due benefits due the plaintiff and the total amount withheld for payment of attorney's fees.

IT IS SO ORDERED.

S/MICHAEL A. TELESKA

Michael A. Telesca
United States District Judge

Dated this 16 Day of November, 2006